## Siti Sarinah bt Sibun v Azizah bt Kamaruddin & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–1376 OF 2002
ABDUL MALIK ISHAK J
16 JULY 2009

*Labour Law — Employment — Damages — General and special damages — Whether plaintiff was dismissed from employment or forced out of employment — Whether damages for wounded feelings or loss of reputation claimable*

*Labour Law — Employment — Misconduct — Unauthorised removal of employer's property — Suspension pending investigation — Whether benefit of doubt given to plaintiff — Whether salaries withheld during period of suspension restored in full — Whether defendants acted within established procedures — Whether mala fide or negligence on part of defendants established — Whether suspension was sham, calculated to oppress or demoralise plaintiff*

The plaintiff, a system analyst, was employed by the second defendant, a bank. Sometime in September 2002, an internal audit was carried out on the second defendant. As a result of that internal audit, the plaintiff was found to have removed two computers and a printer from the second defendant's premises without prior approval or authorisation. A show cause letter was issued against the plaintiff requesting an explanation as to why disciplinary action should not be taken against her. In that show cause letter, she was suspended for 14 days on half pay whilst further investigations were being carried out. The investigation conducted by the second defendant uncovered an alleged authorisation form marked as exh 'P4'. No one seemed to know as to who had signed on that authorisation form. But notwithstanding that, the second defendant gave the plaintiff the benefit of the doubt. Her suspension was lifted and she was asked to report back for work. Further, the plaintiff was categorically told that she would receive full restoration of any salaries withheld by the defendants during the period of her suspension. The plaintiff however, tendered her resignation and thereafter, sued the second defendant, the former employer. The plaintiff sought, inter alia, a declaration that the show cause letter issued by the defendants was void and bad in law. The plaintiff contended that there was mala fide or negligence on the part of the defendants.

**Held**, dismissing the plaintiff's claim with costs:

(1) The defendants had acted correctly in accordance with the established procedures that existed in the second defendant bank as well as in line with good industrial practices. The second defendant did the needful by issuing the show cause letter seeking explanation from the plaintiff of the allegations against her and at the same time suspended her for 14 days. In rendering the show cause letter, the defendants were attempting to obtain the plaintiff's side of the story in writing. In the show cause letter, it was made clear that the suspension of the plaintiff was pending further investigations (see paras 20–21, 23–24).

(2) This was not a case of a structured pattern of victimisation of the plaintiff. This was also not a case where the entire exercise was a sham calculated to oppress or demoralise the plaintiff. The audit report stirred the defendants into action and what the defendants did was merely to comply and in tandem with its own terms and conditions of employment. Not a shred of evidence had been adduced to show that both the defendants were out to victimise the plaintiff or were in league to rid her of her employment (see paras 29, 41).

(3) The plaintiff was never dismissed from employment. She had resigned from her job on her own accord. And even if there was an alleged breach of contract, the period of notice required by either party to bring an end to the contract would apply. But the facts as narrated showed that what the defendants did were perfectly within the four corners of the contract of employment. The wounded feelings or loss of reputation of the plaintiff were not claimable (see paras 50, 53).

**[Bahasa Malaysia summary**

Plaintif, seorang penganalisis sistem, telah diambil bekerja oleh defendan kedua, sebuah bank. Sekitar bulan September 2002, satu audit dalaman telah dijalankan ke atas defendan kedua. Hasil daripada audit dalaman itu, plaintif telah didapati mengalihkan dua komputer dan sebuah pencetak dari premis defendan kedua tanpa kelulusan atau kebenaran terdahulu. Satu surat tunjuk sebab telah dikeluarkan terhadap plaintif meminta penjelasan mengapa tindakan tatatertib tidak patut diambil terhadapnya. Dalam surat tunjuk sebab itu, dia telah digantung kerja selama 14 hari dengan separuh gaji sementara siasatan selanjutnya dijalankan. Siasatan yang dijalankan oleh defendan kedua mendedahkan borang kebenaran yang dikatakan bertanda sebagai eksh 'P4'. Tiada sesiapa yang mengetahui siapa yang menandatangani borang kebenaran tersebut. Meskipun begitu, defendan kedua percayakan plaintif walau berasa sangsi. Penggantungan terhadapnya ditarik balik dan dia diminta melapor balik bekerja. Selanjutnya, plaintif secara mutlak dimaklumkan bahawa dia akan menerima balik sepenuhnya apa-apa gaji yang

ditahan oleh defendan-defendan semasa tempoh penggantungannya. Plaintif bagaimanapun, telah meletak jawatan dan berikutan itu, telah menyaman defendan kedua, bekas majikannya. Plaintif memohon, antara lain, deklarasi bahawa surat tunjuk sebab yang dikeluarkan oleh defendan-defendan adalah terbatal dan tidak mengikut undang-undang. Plaintif menegaskan bahawa terdapat niat jahat atau kecuaian di pihak defendan-defendan.

**Diputuskan**, menolak tuntutan plaintif dengan kos:

(1) Defendan-defendan telah bertindak sewajarnya menurut prosedur-prosedur ditetapkan yang wujud dalam bank defendan kedua dan sejajar dengan amalan baik perusahaan. Defendan kedua telah melakukan yang perlu dengan mengeluarkan surat tunjuk sebab meminta penjelasan daripada plaintif tentang dakwaan-dakwaan terhadapnya dan pada masa yang sama menggantungnya selama 14 hari. Dengan mengeluarkan surat tunjuk sebab, defendan-defendan telah cuba mendapatkan cerita di pihak plaintif secara bertulis. Dalam surat tunjuk sebab itu, ia telah dinyatakan dengan jelas bahawa penggantungan terhadap plaintif adalah sementara menunggu siasatan lanjut (lihat perenggan 20–21, 23–24).

(2) Ini bukan kes penganiayaan yang mempunyai corak berstruktur ke atas plaintif. Ini juga bukan kes di mana keseluruhan pelaksanaan adalah suatu penipuan untuk menindas atau menjatuhkan maruah plaintif. Laporan audit tersebut yang membuat defendan-defendan mengambil tindakan dan apa yang dilakukan oleh defendan-defendan adalah hanya untuk mematuhi dan sejajar dengan terma-terma dan syarat-syarat pekerjaan. Tiada langsung keterangan telah dikemukakan untuk menunjukkan bahawa kedua-dua defendan ingin menganiaya plaintif atau sekongkol untuk membuangnya daripada pekerjaannya (lihat perenggan 29, 41).

(3) Plaintif tidak pernah dipecat daripada pekerjaan. Dia telah meletak jawatan atas kerelaannya. Dan jikapun terdapat dakwaan pelanggaran kontrak, tempoh notis yang diperlukan oleh mana-mana pihak untuk menamatkan kontrak akan terpakai. Namun berdasarkan fakta-fakta menunjukkan bahawa apa yang defendan-defendan lakukan adalah dalam lingkungan kontrak pekerjaan. Perasaan terguris atau reputasi yang terjejas plaintif tidak boleh dituntut (lihat perenggan 50, 53).]

**Notes**

**Cases referred to**

*Berryman v London Borough of Hounslow* [1997] PIQR 83, CA (refd)
*Clouston & Co Ltd v Corry* [1906] AC 122, PC (refd)

A *Commissioners for Executing Office of Lord High Admiral of United Kingdom v Owners of Steamship Susquehanna, The Susquehanna* [1926] AC 655, HL (refd)
*Farley v Skinner* [2002] 2 AC 732, HL (refd)
*Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238; [1980] 1 LNS 156, FC (folld)
B
*Greenlands, Limited v Wilmshurst and the London Association for Protection of Trade & Anor* [1913] 3 KB 507, CA (refd)
*Hewitt v Bonvin & Anor* [1940] 1 KB 188, CA (refd)
*Holt & Anor v Payne Skillington (A Firm) & De Groot Collis* [1996] PNLR 179, CA (refd)
C
*Livingstone v The Rawyards Coal Company* (1879–80) 5 App Cas 25 (refd)
*Loudon v Ryder* [1953] 2 QB 202, CA (refd)
*Mohd Ahmad v Yang DiPertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135, FC (refd)
D
*Perestrello E Companhia Limitada v United Paint Co Ltd, Same v Same* [1969] 1 WLR 570, CA (refd)
*Performing Right Society, Limited v Mitchell and Booker (Palais de Danse), Limited* [1924] 1 KB 762, KBD (refd)
E *Plaat Rubber Sdn Bhd v Goh Chok Guan* [1995] 1 ILR 79 (refd)
*Praed v Graham* (1890) 24 QBD 53, CA (refd)
*Prehn & Anor v The Royal Bank of Liverpool* (1869–71) LR 5 Exch 92 (refd)
*Richard Thornton Brown v Thomas Hugh Boorman, Thomas Boorman, and Thomas Martyr Wild* (1844) 8–12 Cl & Fin 1003, HL (refd)
F *Rookes v Barnard & Ors* [1964] AC 1129, HL (refd)
*Sadler v Henlock* (1855) 4 E & B 570 (refd)
*Simmons v Heath Laundry Co* [1910] 1 KB 543, CA (refd)
*Southern Bank Bhd v Azmi Ali* [2003] 1 ILR 614 (refd)
G *Strvm Bruks Aktie Bolag v John & Peter Hutchison* [1905] AC 515, HL (refd)
*Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314, CA (refd)
*Thomas v Quatermaine* (1887) 18 QBD 685, CA (refd)
*Yewens v Noakes* (1880–81) 6 QBD 530, CA (refd)
H

*Yong Hon Cheong (Zaid Ibrahim & Co) for the plaintiff.*
*Nicholas Netto (Karpal Singh & Co) for the defendants.*

**Abdul Malik Ishak J (now JCA):**

I INTRODUCTION

**[1]** After a full trial, I dismissed the plaintiff's claim with costs. I now give my reasons for doing so.

**[2]** The plaintiff, a former employee of the second defendant, files a claim against the defendants and seeks the following reliefs: **A**

(a) a declaration that the notice dated 23 September 2002 issued by the defendants is void and bad in law;

(b) general damages; **B**

(c) special and/or exemplary damages;

(d) costs;

(e) interest on the judgment amount at the date of and for a duration which this honourable court deems fit and proper; and **C**

(f) any further relief which this honourable court deems fit and proper.

THE BRIEF FACTS **D**

**[3]** The plaintiff was employed by the second defendant, a bank, as a system analyst in the second defendant's information and technology department. An internal audit was carried out in the second defendant sometime in September 2002. As a result of that internal audit, the plaintiff was found to have removed two computers and a printer from the second defendant's premises without prior approval or authorisation. **E**

**[4]** By way of a letter dated 23 September 2002 issued by the second defendant and signed by the first defendant, in her capacity as the bank's secretary/senior manager of the corporate affairs department, the plaintiff was requested to show cause as to why disciplinary action should not be taken against her arising from the allegations that had been made out against her. The show cause letter was marked as exh 'P2'. **F** **G**

**[5]** In that show cause letter, the plaintiff was suspended for 14 days on half pay whilst further investigations were being carried out.

**[6]** By way of a reply dated 26 September 2002 the plaintiff responded to the show cause letter. In her reply which was marked as exh 'P3', the plaintiff explained the allegations against her. **H**

**[7]** Further investigations were conducted by the second defendant through its officers. The investigations uncovered an alleged authorisation form dated 17 April 2002 which was duly marked as exh 'P4'. No one seemed to know as to who had signed on that authorisation form. In its original text, the authorisation form was worded as follows: **I**

"RUJ. KAMI: PP/SPH: 794/2-1 RAMS(7)

**BANK PEMBANGUNAN MALAYSIA BERHAD**
**SISTEM PENGURUSAN ASET, HARTA**

**KEBENARAN MEMBAWA KELUAR HARTA TETAP BANK PEMBANGUNAN DARI MENARA BANK PEMBANGUNAN**

| | | |
|---|---|---|
| NAMA<br>(Sekiranya bukan kakitangan Bank Pembangunan, sila catitkan no. Kad Pengenalan) | : | Siti Sarina Sibun |
| JABATAN<br>(Nama Syarikat sekiranya bukan bagi pihak Bank) | : | Jabatan Teknologi Maklumat<br>Seksyen Sistem Teknologi |
| BUTIR-BUTIR HARTA TETAP | | |
| NAMA ASET | : | Satu set pc HP Brio P III |
| ASET KOD | : | 003100, 039226, KR 9332148 |
| TANGGUNGJAWAB ASET | : | Jabatan Teknologi Maklumat |
| LOKASI ASET | : | Jabatan Teknologi Maklumat |
| KETERANGAN ASET | : | Satu set pc HP Brio P III |
| TUJUAN | : | Untuk dibawa pulang ke rumah bagi tujuan kerja. Sistem baru perlu dilaksanakan segera bagi mencapai matlamat sebelum date line. |
| PENGESAHAN DARI JABATAN TERLIBAT | : | Adalah disahkan dan dibenarkan Harta Tetap di atas dibawa keluar dari Bangunan ini bagi tujuan seperti tercatit. |
| | | Sgd. (Illegible) ..... Pengurus/ Ketua Jabatan (Semasa ketiadaan beliau: b/p) |
| | | 17/4/2002 ..... Tarikh |

| | | |
|---|---|---|
| **UNTUK DIISI OLEH SEKSYEN PENTADBIRAN & HARTA:** | | |
| **Tandatangan Yang Dibenarkan** | **K.P. Damak Sec. (M) S/B** | |
| **Sgd. (Illegible)** | **Sgd. (Illegible) 17.4.02** | **17/4/2002** |
| **SEKSYEN PENTADBIRAN & HARTA** | **Bank Pembangunan (BPL) B** | **Tarikh** |

| | | |
|---|---|---|
| **DISEDIAKAN / DIKOMPUTERKAN** | **DISEMAK OLEH:** | **DISAHKAN OLEH:** |
| ..... | ..... | ..... |
| **(ZAINAL ABIDIN SUDIN)** | **(SAADAN MOHAMED SENIN)** | **(ZUBER BIN DIN)** |
| **KERANI ASET** | **PEGAWAI HARTA** | **PENGURUS SEKSYEN PENTADBIRAN DAN HARTA** |

**NOTA:**

**BORANG INI HENDAKLAH DIISI DALAM DUA (2) SALINAN. SATU SALINAN DISIMPAN OLEH SEKSYEN PENTADBIRAN & HARTA DAN SESALINAN DISIMPAN OLEH BPMB URUS HARTA SDN BHD MELALUI PENGAWAL KESELAMATAN.**

**[8]** Saadan bin Mohamed Sinin (DW2) — the second witness for the defendants in his witness statement marked as 'J' was asked to explain in general in regard to the authorisation form in exh 'P4' and this was what he said:

> This is the 'Borang Kebenaran Membawa Keluar Harta Tetap Bank' which must be filled in if a fixed asset belonging to the Bank has to be removed and taken out of the premises of the Bank.

**[9]** Saadan bin Mohamed Sinin (DW2) explained further in his witness statement in regard to the authorisation form in exh 'P4' and this was what he said in answer to the questions that were posed to him:

> Q7: Have you ever seen this particular form as filled in on page 38 of the Plaintiff's Bundle 'B' exhibit P4 during the material time in April 2002?
>
> A7: No. I have never seen a form as filled in like this particular one.
>
> Q8: Please refer to the 2nd box from the top which is entitled 'Untuk diisi oleh Seksyen Pentadbiran dan Harta'. In the portion stating 'Tandatangan yang dibenarkan' for the 'Seksyen Pentadbiran dan Harta', who should be the one who signs in this box in April 2002?

A8: In the month of April 2002, I would be the one who has to sign in this box as the Manager of the Property and Administration Department.

Q9: Does the signature seen in the box belong to you?

A9: No. This is not my signature.

Q10: Do you know whose signature it is that appears on this form?

A10: No. I do not know whose signature it is that appears on the form. I have also enquired from the officer and clerk in my section and they too have confirmed that they did not sign this form nor are they aware of who in fact signed the form.

Q11: Why is it that your name appears in the 3rd box under place 'Checked By' as a 'Pegawai Harta'?

A11: Possibly, whoever filled this form had used an old form that was printed as such. In April 2002, I was already holding the position of Manager and my name should no longer appear as 'Pegawai Harta' in the form.

**[10]** The value of the authorisation form in exh 'P4' was questionable. It was dubious. But notwithstanding that the second defendant gave the plaintiff the benefit of the doubt. With this in mind and by way of a letter dated 4 October 2002 signed by the first defendant on behalf of the second defendant, the plaintiff was duly informed that the authorisation form in exh 'P4' was discovered and she too was informed that the case against her was closed. The letter dated 4 October 2002 was marked as exh 'P5' and the plaintiff was also informed by that letter that her suspension was lifted and that she was to report back for work on 7 October 2002. The plaintiff was also informed by that letter dated 4 October 2002 in exh 'P5' that her salaries withheld during the period of suspension would be restored to her in full.

**[11]** The plaintiff sought the services of a lawyer and that lawyer wrote to the first defendant on 7 October 2002 as per exh 'P6'. In that letter the lawyer requested the first defendant to suggest an amicable settlement.

**[12]** The second defendant replied by way of a letter as seen in exh 'P7' to the lawyer in question. In that letter of reply, the second defendant explained that the issuance of the show cause letter was part and parcel of proper industrial relations practices and it was premised on the policies and procedures of the second defendant. The letter of reply further explained that the issuance of the show cause letter to the plaintiff and the suspension thereto were not part of the second defendant's disciplinary proceedings but rather it was to provide the plaintiff with the golden opportunity to put forward her explanation.

**[13]** Everyone was caught by surprise when the plaintiff by letter dated 10 October 2002 addressed to the human resources division of the second

defendant tendered her resignation. That letter of resignation was marked as exh 'P9'.

ANALYSIS

**[14]** When you talk of negligence in the context of the breach of a duty to take care, you must apply the objective test. You have to ask yourself whether a particular conduct, objectively considered, amounts to a breach of a duty to take care. Bowen LJ described negligence in *Thomas v Quatermaine* (1887) 18 QBD 685 (CA) at p 694 as 'simply neglect of some care which we are bound by law to exercise towards somebody'.

**[15]** It is a correct statement of the law to say and I so say that the main feature of the tort of negligence is breach of a duty to take care. A tortious duty of care arises from an objective view of the given facts. This distinguishes it from a breach of contract (*Richard Thornton Brown v Thomas Hugh Boorman, Thomas Boorman, and Thomas Martyr Wild* (1844) 8–12 Cl & Fin 1003 (HL). It cannot be denied that a contract may contain an obligation to take care in the performance of its terms and such an obligation arises from the agreement or presumed agreement of the parties.

**[16]** However, where a term in the contract imports a duty to take reasonable care in the course of its performance, it is equivalent to a duty to take care just like in tort. A caveat must be inserted. Not every breach of contract involves a breach of tortious duty. The Court of Appeal in *Holt & Anor v Payne Skillington (A Firm) & De Groot Collis* [1996] PNLR 179 (CA), categorically stated that where a duty of care arises between the parties to a contract, wider obligations can be imposed in tort than those arising under the contract. On the other side of the fence, there may be occasions where the remedy of damages would be more attractive and generous where the claimant is in a position to establish a case in contract rather than in tort (*Farley v Skinner* [2002] 2 AC 732 (HL)).

**[17]** There is always a danger when we treat a breach of contract as though it runs co-extensively with a breach of duty in tort. This is well illustrated by the case of *Berryman v London Borough of Hounslow* [1997] PIQR 83 (CA). In that case, the plaintiff suffered injury while climbing the flight of stairs to her flat when the lift was out of order and her claim failed because it was appropriate to apply the contractual rules as to remoteness of damage as opposed to those in tort.

**[18]** With these brief insights into the law, I will now revert to the evidence that was led in court. Evidence wise, there was an audit that was carried out by the second defendant and the result of that audit exercise was reduced in

writing by way of an audit report dated 17 September 2002 as seen at pp 23–37 of bundle 'B' and marked accordingly as exh 'D-14'.

**[19]** It is a rather long audit report and the relevant portion of it can be seen at p 35 of bundle 'B'. At this page, the report shows that the auditors found that computers had been removed by the plaintiff and that, at that juncture, no formal written approval or authorisation for the removal could be found. The audit report carried the information that although the plaintiff had apparently obtained approval from the acting manager of the information technology department, yet no formal written approval or authorisation could be found. The audit report further stated that checks with the technology services section manager at that time revealed that the plaintiff had not been assigned the tasks that she claimed she had been carrying out with the computers from her home.

**[20]** Given the background information as contained in the audit report, what could the defendants do? Learned counsel for the defendants rightly pointed out that with a prima facie case of an alleged wrong doing, it could only do what was fair in terms of good industrial practices. And that would be to give an opportunity to the plaintiff as an employee to defend herself.

**[21]** In my judgment, the defendants had acted correctly in accordance with the established procedures that existed in the second defendant bank at that point of time.

**[22]** In the second defendant's employment handbook entitled 'Terms and Conditions Of Service For Officers' — the excerpts of which can be found at pp 12–19 of bundle 'B' marked as exh 'D10', article 30.2 which is the correct article to refer to carries the following stipulations:

> The Bank may suspend an officer before and/or after an inquiry and he shall be notified accordingly. The suspension from work can either be with full pay or half pay for a period not exceeding fourteen (14) days based on the seriousness of the offence and with full pay if further suspension is required.

**[23]** In reliance of article 30.2, the second defendant did the needful by issuing the show cause letter as seen in exh 'P2'. In that show cause letter, the second defendant acting through the first defendant sought the plaintiff to explain the allegations against her and at the same time suspended her for 14 days.

**[24]** It is the stand of the defendants that in rendering the show cause letter to the plaintiff, the defendants were attempting to obtain the plaintiff's side

of the story in writing. It must be borne in mind that in the show cause letter, it was made clear that the suspension of the plaintiff was pending further investigations.

**[25]** Honesty and integrity are two virtues that cannot be compromised by an employee no matter what position the employee holds in the organisation. In *Southern Bank Bhd v Azmi Ali* [2003] 1 ILR 614, the Industrial Court had this to say at p 625:

> The court is of the view that honesty and integrity are amongst the key characteristics that any employee should possess, no matter what form of employment the employee is engaged in. However, such characteristics are of utmost importance in the banking industry as the bank is the custodian of public money and property. The court therefore agrees with learned counsel that as it is clear that the claimant had premeditated to 'cheat' the bank, the negligible amount involved is immaterial and hence the misconduct committed by the claimant is serious. Since such misconduct had marred the trust and confidence the bank had in the claimant, the court finds that the punishment meted to the claimant is appropriate in the circumstances of the case.

**[26]** It must be recalled that the report on the internal audit investigations that was carried out revealed that on 17 April 2002, the plaintiff had taken out two sets of computers including a printer from the second defendant bank without the written approval by the second defendant bank. This was also averred at para 8 of the defendants' statement of defence.

**[27]** And at para 21 of the statement of defence, it was averred that the second defendant bank as an employer was entitled, in law, to carry out any investigations to ascertain whether its employees had committed misconduct. This meant that the second defendant bank was saying that they were entitled to investigate the plaintiff for misconduct.

**[28]** By far, the commonest ground put forward to justify dismissal is misconduct. And according to *Bowers on Employment Law* (5th Ed) at p 281, at para 13.8:

> Dismissals relating to misconduct cover a multitude of sins, …

**[29]** Thus far, not a shred of evidence had been adduced to show that both the defendants were out to victimise the plaintiff or were in league to rid her of her employment. The first defendant testified that she had merely signed the letters that had been prepared by the human resource department as part of her varied duties. In short, she was just doing her job. The first defendant further testified, and this was confirmed by the plaintiff herself, that both of them had little dealings with one another. They knew of each others existence

as mere colleagues in the second defendant but there was little or no interaction between them be it at the work site or elsewhere. Thus, there was no evidence whatsoever to show that the first defendant had any malicious intent towards the plaintiff.

**[30]** In so far as the second defendant was concerned, the two sets of computers including a printer were taken out from the second defendant's premises without the written approval of the second defendant as evidenced from the audit report and the second defendant as an organisation cannot sweep that episode under the carpet and pretend that nothing was amiss. The second defendant as a bank had to act and did exactly that by issuing the show cause letter in exh 'P2' to the plaintiff. This was done in accordance with the procedures set by the second defendant bank as well as in line with good industrial practices.

*Salmond and Heuston on the Law of Torts* (20th Ed, 1992), at p 448 defined an employee:

> as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and direction of his employer in respect of the manner in which his work is to be done.

**[31]** According to MacKinnon LJ in *Hewitt v Bonvin & Anor* [1940] 1 KB 188 at p 191, the above mentioned definition can 'hardly be bettered'. Now, from this definition, it can be surmised that an employee is bound to obey all lawful orders given by the employer as to the way in which the employee's work shall be done. The power of control rests entirely with the employer and the employer has the power to direct the employee as to what to do and how the work has to be done (*Sadler v Henlock* (1855) 4 E & B 570 at p 578; *Simmons v Heath Laundry Co* [1910] 1 KB 543; *Yewens v Noakes* (1880–81) 6 QBD 530 (CA)). McCardie J, in *Performing Right Society, Limited v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762 at p 767 laid down the salient test in this way:

> ... the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant.

**[32]** In this case, the form of control and direction was by way of the terms and conditions of employment that the plaintiff was well aware of. In the course of the trial, the 'Buku Panduan Syarat Dan Perkhidmatan Untuk Pegawai-Pegawai' was tendered wholesale and marked as exh 'D11'. In that book the 'Terms And Conditions Of Service For Officers' provides the necessary guidelines to be followed by all the employees of the second defendant bank and article 28 thereto reads as follows:

Article 28 CODE OF CONDUCT

28.1 All officers shall conform to the code of conduct as set out in the Employees' Code of Conduct and Discipline Handbook (hereinafter referred to as 'Code of Conduct Handbook') and non-conformance thereto shall render the officer liable to disciplinary action thereunder.

**[33]** The plaintiff contended that there was mala fide or negligence on the part of the defendants. According to the plaintiff, the defendants should have at least convened an internal inquiry based on the revelations in the audit report. The defendants argued that the audit investigations were an inquiry that revealed issues of non-compliance by the plaintiff. It was premised on this audit report that prompted the defendants to seek an explanation from the plaintiff in regard to those two computers and the printer.

**[34]** The extensive audit exercise revealed no trace of the plaintiff having been given the authority to remove the two computers and the printer. It was only after the plaintiff had responded to the show cause letter that the mysterious authorisation form appeared. In my judgment, the defendants had done all that was necessary to be done. At that point of time, before the discovery of the authorisation form, a prima facie issue of misconduct was at hand. Faced with the plaintiff's misconduct, the defendants had no choice but to issue the show cause letter and suspended the plaintiff for 14 days.

**[35]** The Industrial Court defined 'misconduct' in *Plaat Rubber Sdn Bhd v Goh Chok Guan* [1995] 1 ILR 79 in this way:

> Misconduct means such act or conduct as adversely affects employees duties towards the employer. The misconduct complained of must have the same relations with the employees duties or the work entrusted to him by the employer or his competency to perform the same. Any breach of an express or implied duty on the part of the employee, unless it be of a trifling nature, would amount to misconduct.

**[36]** And the burden of proving misconduct justifying dismissal lies with the employer and it would be based on the balance of probabilities (*Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314 (CA)). According to Lord James of Hereford in *Clouston & Co Ltd v Corry* [1906] AC 122 (PC) at p 129:

> There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.

A [37] Here, we are not concerned with the dismissal of the plaintiff as a result of her misconduct. The defendants did not dismiss the plaintiff at all. The plaintiff was merely suspended for 14 days after the issuance of the show cause letter. Nothing more and nothing less. The moment that the defendants discovered the mysterious authorisation form in exh 'P4', the benefit of the B doubt was given to the plaintiff and she was promptly recalled back to work.

[38] It must be borne in mind that at the material time when the show cause letter was issued, there was no evidence to suggest that there was some credible explanation that would have exculpated the plaintiff. The show cause C letter was the by-product of the audit report. In my judgment, the audit report was the product of the investigations and inquiry that were carried out by the defendants.

D [39] The defendants submitted that if the plaintiff's claim was upheld it would open the floodgates against every employer who seeks to issue show cause letters to find out the employee's version of the story. While acknowledging that this was not an industrial relations based suit, the fact remains that the nature of the plaintiff's claim stems from a whole gamut of facts and circumstances that relate to employment issues and the handling of E disciplinary cases. As demonstrated what the defendants did was not done impulsively but were mere follow up actions pursuant to an audit report. The floodgates here would relate to the challenges which employees would pursue against every suspension and would allege victimisation every time an employer issues a show cause letter to suspend the employee. F

[40] This was not a case of a structured pattern of victimisation of the plaintiff. This was also not a case where the entire exercise was a sham calculated to oppress or demoralise the plaintiff. The audit report stirred the G defendants into action and what the defendants did was merely to comply and in tandem with its own terms and conditions of employment.

[41] I will now say something about the plaintiff's conduct. The plaintiff knew the terms and conditions of her employment as reflected in exhs 'D10' H and 'D11'. She never denied this fact. She was fully aware of the second defendant's right to suspend any employee pending investigations or inquiries.

I [42] The plaintiff comes before this court seeking damages but, on the available evidence, there has been no proof at all as to what damages she seeks. She failed to prove the quantum of damages that this court should order in her favour. Thus far, the plaintiff has yet to prove the nature of her loss or damage. The burden falls on the plaintiff to prove the damages which she seeks from this court. If this court were to consider wages lost, it must be

balanced with the fact that the plaintiff was not dismissed by the defendants nor being forced out of employment. In fact, the plaintiff was recalled to serve the second defendant's bank but, unfortunately, she never came back to serve. Her husband by the name of Roszaidie bin Hamzah (PW2) in his witness statement admitted that he had asked the plaintiff to resign from her job.

**[43]** The measure of damages in the words of Lord Blackburn in *Livingstone v The Rawyards Coal Company* (1879–80) 5 App Cas 25 at p 39 would be:

> that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

**[44]** General damages can be calculated but there must be evidence to assist the court in calculating it. Special damages, on the other hand, must be claimed specially and proved strictly. Of course, general damages are such that the law will presume to be the direct, probable or natural consequence of the action complained of but evidence must be led to assist the court in computing the quantum. You just cannot throw general damages, or special damages at the feet of the court and expect wonders to happen. You have to prove it by leading evidence (*Prehn & Anor v The Royal Bank of Liverpool* (1869–71) LR 5 Exch 92; *Commissioners for Executing Office of Lord High Admiral of United Kingdom v Owners of Steamship Susquehanna, The Susquehanna* [1926] AC 655 at p 661; *Strvm Bruks Aktie Bolag v John & Peter Hutchison* [1905] AC 515; and *Perestrello E Companhia Limitada v United Paint Co Ltd, Same v Same* [1969] 1 WLR 570 (CA)).

**[45]** The main purpose of exemplary damages is to punish and according to Lord Devlin in *Rookes v Barnard & Ors* [1964] AC 1129 at pp 1227–1228, three conditions must be fulfilled:

(a) that a claimant cannot recover exemplary damages unless he or she is the victim of punishable behaviour;

(b) that the awards of exemplary damages should be moderate; and

(c) the financial means of the parties.

**[46]** But the conduct of the parties has to be taken into account and it remains a relevant consideration in assessing exemplary damages (*Praed v Graham* (1890) 24 QBD 53 (CA); *Greenlands, Limited v Wilmshurst and the London Association for Protection of Trade & Anor* [1913] 3 KB 507; *Loudon v Ryder* [1953] 2 QB 202 (CA), at p 207). Again evidence must be led for the court to quantify.

**[47]** Incidentally, in order to claim back wages, the plaintiff's best recourse would be to proceed at the Industrial Court. Unfortunately, she did not proceed with this course of action. It must not be forgotten that it was the plaintiff who resigned. It must be recalled that the second defendant had issued a letter on 4 October 2002 asking the plaintiff to report back for work. She was categorically told that she would receive full restoration of any salaries withheld by the defendants during the period of her suspension. And that she was to report back to the very same position she held and, consequently, it would be correct to say that there is absolutely no evidence of any loss. The plaintiff resigned from her job and she thanked the second defendant for employing her. It was entirely her decision to resign from her job and be a full time housewife, presumably on the advice of her husband, and to enable her to devote full time to bring up her children. That was an admirable conduct on her part but it cannot be used as a leverage against the defendants. The latter should not be held accountable for her decision to resign from her job.

**[48]** It is germane, at this juncture, to refer to the judgment of His Majesty Raja Azlan Shah CJ Malaya (as His Majesty then was) in the case of *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238; [1980] 1 LNS 156, and there His Majesty had this to say:

> In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, eg, a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job immediately or during the notice period with some other employer. He cannot sue for wounded feelings or loss of reputation caused by a summary dismissal, where for instance he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, viz, an award of damages. Further, the courts will not normally 'reinstate' a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid: see *Vine v National Dock Labour Board* [1957] AC 488 at pp 500, 507; *Francis v Municipal Councillors of Kuala Lumpur* [1962] 1 WLR 1411; [1962] MLJ 407. At the most it will declare that it was wrongful. However his common law right has been profoundably affected in this country by the system of industrial awards enacted in the Industrial Relations Act 1967. The wrongfully dismissed workman can now look to the remedies provided by the arbitration system. He can now look to the authorities or his union to prosecute the employer and force the latter to reinstate him. Reinstatement, a statutorily recognised form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law. The speedy and effective resolution of disputes or differences is clearly seen to be in the national

interest, but it is also apparent that any attempt to impose a legal obligation without a prior exploration for a voluntary conciliation could aggravate rather than solve the problem. To this end the Director General is empowered by s 20 of the Act to offer assistance to the parties to the dispute to expedite a settlement by means of conciliatory meetings. The process is entirely voluntary and the Director General will not usually become involved unless the workman fulfils the internal procedure as laid down by the section which is: 'he may, within one month of the dismissal, make representations in writing to the Director General to be reinstated in his former employment.' The word 'may' in our view refers to the alternative remedy available to the wrongfully dismissed workmen to claim for reinstatement under our arbitration system. We say this because the-general common law considerations applicable to contracts of employment have been modified, in the area to which industrial awards are applicable, to the advantage of the workman in relation to wrongful dismissals where he could now ask to be reinstated in his former employment.

**[49]** I am certainly guided by these principles of law. I hold that the plaintiff was never dismissed from employment. And even if there was an alleged breach of contract, the period of notice required by either party to bring an end to the contract would apply. The wounded feelings or loss of reputation of the plaintiff are not claimable. This would be my judgment and I so hold accordingly.

**[50]** In *Mohd Ahmad v Yang DiPertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135 (FC), Peh Swee Chin FCJ delivering the judgment of the Federal Court had this to say (see p 371 (MLJ); p 148 (CLJ) of the report):

In other words, the claim for reinstatement available to a permitted claimant in an Industrial Court or to a holder of a public office as categorised under art 132 of the Federal Constitution is therefore not available to the supervisor. The said principle applies, and he is entitled to claim damages only if he can establish that his dismissal is in breach of his contract of service. The non-observance or non-compliance of such General Orders, Cap D in the case of the supervisor herein, is, equivalent to a breach of condition of the contract of personal service of the supervisor, the condition being the use of such General Orders.

**[51]** That was a case (referring to *Mohd Ahmad*'s case) of a supervisor of a market who claimed for declarations that his dismissal by the local council was null and void. In holding that the employee was not entitled to reinstatement, His Lordship held that there was a possibility for the employee to claim damages provided it could be proven that there had been a breach of the contract of employment.

A **[52]** I venture to say that if the plaintiff could demonstrate that the defendants had in issuing the suspension letter or the show cause letter breached a term or a condition of the contract of employment, then damages perhaps may arise upon proof. But the facts as narrated showed that what the defendants did were perfectly within the four corners of the contract of
B employment.

**[53]** For the reasons adumbrated above, the plaintiff's claim must fail.

*Plaintiff's claim dismissed with costs.*

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Reported by Ashgar Ali Ali Mohamed

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